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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 616.

THE THAMES & MERSEY MARINE INSURANCE COMPANY, LIMITED, Plaintiff in Error,

against

THE UNITED STATES OF AMERICA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

EVERETT P. WHEELER,
Of Counsel for Plaintiff in Error.

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First.

Residence Petitioner.

1. It is obvious from the allegations of petition that petitioner is a foreign corporation. If the allegation is not specific enough it was amendable and would have been amended in the court below if objection on this ground had been specified. The failure to specify it was a waiver.

See cases cited under First Point, supplemental brief in Hvoslef case, No. 331.

2. The limitation as to residence does not apply to foreign corporations if the word resident in the Tucker Act be strictly construed. It could not have been the intent of Congress to exclude foreigners from the benefit of that act.

N. Y. & O. S. S. Co. *vs.* United States, 202 Fed., 311.

3. In ordinary language a foreign corporation has a residence in the district where it has its principal place of business.

In re Hohorst, 150 U. S., 653.

The allegation of petition is (R., 2):

> "Its principal office for conducting said business in the United States, *and its residence was and is* in the Borough of Manhattan, city of New York, *in said district.*"

This is admitted by demurrer.

Second.

Report Judiciary Committee.

The Solicitor General appends to his brief in the Hvoslef case (No. 331) a copy of a report from the Judiciary Committee of the House upon the bill which, in amended form, became the act of July 27, 1912, alleged in petition (R., 4). This report cannot affect the decision here.

1. It is only in cases where the language of an act is obscure that such reports can be considered.

There is no question here of strict or liberal construction. Congress has passed a just act; the case is directly within its terms; the sum claimed is alleged to have been wrongfully collected under the provisions of the war-revenue tax, and the claim has been presented to the Commissioner of Internal Revenue.

The report which defendant cites expressly says that the bill is intended to take the place of many special acts pending in Congress. It declares that the Secretary of the Treasury "has several times recommended that general legislation be enacted giving these claimants (that is, those who had applied to Congress) additional time in which to present claims for the refund of taxes erroneously assessed or illegally collected under the act of June 13, 1898, commonly known as the Spanish War Revenue Tax Act" (Brief, p. 37).

It is true that the last paragraph of the report makes special reference to particular claims, but it is equally clear that the Government was desirous that instead of special acts there should be general legislation on the subject. These very claimants had a bill for their special relief pending in the Senate at the time this report was made. It was in reference to this as well as to all the other bills pending that the Secretary made his recommendation. So far from throwing any doubt on the construction of the act in question, this report tends to confirm plaintiff's contention that the act is a general one and comprehends all claims for the refund of taxes wrongfully collected under the War Revenue Tax.

The report reads as if it had been drafted with reference to one class of claims, but that the draftsman amended it so as to apply to all the pending claims for which relief was sought. This would account for the generality of some paragraphs and the more limited language of others.

Third.

Policies or Certificates of Insurance Are Commercially Necessary to Carry on the Export Trade.

The bill of lading and the bill of exchange are not the only documents essential to export business. No bank would discount a draft secured *only* by a bill of lading, and no purchaser would accept or pay the draft in exchange for a

bill of lading only. Both banker and buyer require protection by insurance against the dangers incident to the export transit. It would be absolutely impossible to finance the country's export trade without insurance. Every exporter is required to annex to his draft against the purchaser abroad, not only a bill of lading which shows that the goods have been delivered to the carrier, but also an insurance certificate which shows that he has insured the goods while in transit. The absolute necessity for attaching the insurance certificate to the draft cannot be questioned.

It is generally admitted that our export commodities are in large part moved by foreign capital. In his message to Congress of December, 1910, President Taft, in discussing cotton bills of lading, referred to the fact that the money which foreign bankers "furnished to move our cotton crop is of great value to this country." During the present European war the proportion of domestic capital which is used to move our exports is larger. In either cases insurance is essential.

How is it that the capital is actually supplied for our needs? To answer the question we must refer to the way in which our export documents are handled. The ordinary export sale is based on what is known as a c. i. f. contract (cost, insurance, and freight). Under such a contract, the purchaser of goods pays a fixed sum, which covers the cost of the goods, the cost of insurance while in transit, and the export freight. For instance, a shipper in Memphis, by cable, sells 100 bales of cotton c. i. f., his draft for payment to be drawn against the London City and Midland Bank, payable 60 days after sight. The cotton is delivered to a carrier and a through bill of lading is obtained, under which the cotton is made deliverable to the order of this *shipper*. The latter endorses this bill of lading in blank, draws his draft against the banker abroad, insures his goods against loss in transit, attaches to his draft both the bill of lading and the insurance certificate, and then takes these

documents to his local bank to have the draft discounted. The local bank advances him the amount of his draft, less discount, and forwards the draft to New York. New York bankers, needing foreign exchange, buy the draft, and forward it abroad for acceptance; the London City and Midland Bank accepts the draft, and then the London money market loans upon it until the date of maturity arrives. Between the date upon which the draft is drawn and the date of payment, the local banker, the New York exchange buyer, and in some instances, where the drafts are payable 80 or even 120 days after sight, three or four European bankers are at different times legal owners of the draft and hold legal title to the goods as collateral security for the payment of the draft.

See cases cited on pages 11-14, principal brief.

Our export trade in 1910 amounted to over two billion dollars. In 1911 the value of our export cotton alone was over five hundred and eighty-five million dollars. To obtain such vast sums of money application must be made to the money centers of the world, and such application would be useless if the American shipper did not, at the outset, insure the exported goods against which his drafts are drawn in such a way as to protect in turn each holder of the bill of lading and the draft.

Assume that an exporter applies to a local bank for the discount of an export draft without an insurance certificate attached. The banker must inevitably ask what his security will be if the goods are destroyed while he holds the bill of lading. The only possible answer is that he will have no security left whatever except, perhaps, a dubious lawsuit against the carrier. Obviously, if the bankers had no protection against the perils of the sea, or other risks of transportation, they could not and would not discount drafts drawn against export goods. The only commercially possible way is for the shipper to effect insurance as soon as the goods are ready for shipment, and so to arrange his insur-

ance that the protection of his policy shall inure to the benefit of each holder of the bill of lading, no matter how often it may be transferred from one party to another.

Fourth.

When Commerce Begins.

The authorities on the subject of taxation throw light upon the subject under consideration.

Coe vs. Errol, 116 U. S., 517:

It was there held that the moment when the change of jurisdiction takes place is that (p. 525), "in which they (the goods) commence their final movement for transportation from the State of their origin to that of their destination."

P. 527: They cease to be subject to taxation when "they have been shipped or entered with a common carrier for transportation to another State or have been started upon such transportation in a continuous route or journey."

So, in *The Daniel Ball,* 10 Wall., 557 (565), the court said:

> "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced."

In the case at bar the policies or certificates become part of the export trade the moment the goods begin their movement to the ship, for exportation, and the certificates of insurance covering them are signed (R., 2, 3, 6).

The stamp tax was exacted and paid after this (R., 3, Sixth Article, Petition).

Fifth.

The argument for the Government leads logically to the conclusion that the States could tax export charter parties and policies of marine insurance on exports. So far as taxes on exports are concerned the prohibition on the States is in the same language as that on Congress. Does the Government seriously contend that a State tax on such charter parties and policies of insurance would be valid? If such be the case the States could cripple or destroy foreign commerce. Is not this a *reductio ad absurdum?*

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